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No. 07-1037

In the

Supreme Court of the United States

RITA J. CARLS, and NICHOLAS ANTHONY BERNARDONI and ANDREA R. BERNARDONI, minors by and through their Guardian ad Litem PETER BERNARDONI,

Petitioners,

v.

BLUE LAKE HOUSING AUTHORITY as successor-in-interest to J&L PROPERTIES,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners Rita J. Carls, et al. (Ms. Carls), respectfully file this Reply to the Brief in Opposition (Opp.) filed by Respondent Blue Lake Housing Authority (Blue Lake).

I

THE RECORD IS FULLY DEVELOPED

The question presented in the petition is extremely narrow: "When a tribe voluntarily acquires a non-tribal business, with existing contract obligations, does sovereign immunity allow the tribe to repudiate those obligations?" Petition (Pet.) at i. On this question, the record is fully developed.

The record establishes that J&L Properties, a non-tribal business, had existing contract obligations at the time of its acquisition by Blue Lake, specifically warranty-related obligations under its home-purchase contract with Ms. Carls. Appendix (App.) at A7-8. The record also shows that the contract expressly authorizes arbitration and adjudication of warranty-related disputes by state and federal courts. App. at A8, I3, I16, I23-24, I26-27. Importantly, the record reveals that, by its own admission, Blue Lake is a tribal entity that voluntarily "acquired the assets ***and liabilities*** of J&L Properties"—including the obligations under the home-purchase contract. App. at A3 (emphasis added).

The question before the Court is whether *despite* these undisputed facts as fully developed in the record, a tribal entity like Blue Lake can *still* avoid liability in state or federal court for assumed obligations under the cloak of tribal immunity. Ignoring this narrow question, Blue Lake instead focuses on irrelevant evidentiary issues. It objects to the record's adequacy

on grounds that Ms. Carls "did not conduct any discovery" and "presented no evidence" on issues pertaining to (1) Blue Lake's tribal entity status, (2) its acquisition of J&L Properties, and (3) the arbitration and choice-of-law provisions in Ms. Carls's home-purchase contract. Opp. at 2-3. When considered in light of the question presented, none of Blue Lake's objections has any merit.

First, the petition does not put Blue Lake's tribal status at issue. Quite the contrary, the question presented specifically assumes that Blue Lake *is* a tribal entity. Pet. at i, 4.

Second, Blue Lake objects that Ms. Carls did not produce a copy of its merger agreement with J&L Properties or any other evidence regarding the nature of its acquisition of J&L Properties. Opp. at 2-3. Blue Lake contends that the absence of this evidence makes the petition a poor vehicle for review of the immunity issue. But Blue Lake's evidentiary objections only beg the question as framed in the petition.

The petition asks whether, given the undisputed facts in the record *and no more*, a tribal entity can still invoke sovereign immunity to shield itself from voluntarily assumed obligations. Blue Lake's admission that it acquired the liabilities of J&L Properties—coupled with the home-purchase contract providing for arbitration and adjudication of warranty-related claims in state or federal court—constitute sufficient evidence of Blue Lake's waiver of immunity. Whether, as Blue Lake argues, courts should require even more or different evidence than the present record contains is the issue Ms. Carls is asking this Court to resolve.

Moreover, Blue Lake's complaint that the record does not contain a copy of the merger agreement or other evidence of the transaction is highly suspect. If such evidence contained proof that Blue Lake preserved its immunity, one is left wondering why Blue Lake failed to produce it in the trial court. The present record paints a full enough—and uncontradicted—picture of the merger: By acquiring J&L Properties' liabilities, Blue Lake became the successor-in-interest to J&L Properties' preexisting contract obligations, including warranty-related obligations to Ms. Carls.

Third, Blue Lake makes passing reference to the fact that "[t]he only mention of an arbitration agreement in the record is in an unauthenticated Contract of Purchase attached to [Ms. Carls's complaint]." Opp. at 3. The objection is irrelevant, particularly as both the trial court and the court of appeal received the home-purchase contract into evidence. App. at A4, A8-A9. In any event, the record contains no evidence of Blue Lake's objection to the contract for lack of authentication, either in the trial court or in the court of appeal, making its authentication unnecessary. Cal. Evid. Code § 353(a).

II

EXPANSION OF TRIBAL IMMUNITY RAISES AN IMPORTANT FEDERAL QUESTION

The California Court of Appeal's decision in this case significantly expanded the scope of tribal immunity, thereby raising an important federal question. Blue Lake's arguments do not—and cannot—contest this fact.

This case is on all fours with *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). In *C&L Enterprises*, this Court held that a tribe waives its immunity by agreeing to a contract containing arbitration and choice-of-law provisions for adjudication in state or federal court. Here, Blue Lake agreed to acquire J&L Properties' assets and liabilities. One of those acquired liabilities was Ms. Carls's home-purchase contract, which contains the same arbitration and choice-of-law provisions at issue in *C&L Enterprises*.

That Blue Lake was successor-in-interest—as opposed to the original party—to Ms. Carls's home-purchase contract is a distinction without a difference: Blue Lake voluntarily acquired the obligations arising under that contract, which expressly recognizes arbitration and state- and federal-court jurisdiction over warranty-related disputes. The court of appeal *expanded* the scope of tribal immunity by significantly limiting the circumstances under which a *C&L Enterprises* waiver may occur.

Blue Lake ostensibly denies that the court of appeal expanded tribal immunity. Opp. at 8. It highlights the fact that the court of appeal's decision was based solely upon Ms. Carls's alleged "failure to provide evidence" of waiver. *Id.* As an example, Blue Lake cites the absence in the record of the merger agreement between it and J&L Properties. *Id.* at 9. But Blue Lake's argument only reinforces the conclusion that the court of appeal expanded tribal immunity by creating an unprecedented burden of proof for waivers that severely limits *C&L Enterprises*'s application.

It is true that the court of appeal required more evidence than Blue Lake's admission that it assumed J&L Properties' liabilities, including a contract with waiver language of the kind found in *C&L Enterprises*. The dissenting Presiding Justice seemed perplexed by the court's evidentiary demands. App. at A12-A13. But its requirement of more evidence is a reason to *grant* the petition, because it raises a significant federal question: Should the logic of *C&L Enterprises* be set aside and tribal immunity be expanded to protect tribes who voluntarily become successors-in-interest to the contractual obligations of non-tribal businesses—simply because they are not the *original* parties to those obligations?

Blue Lake also argues that the petition should be denied, because Ms. Carls's warranty claim under the home-purchase contract lacks merit. Opp. at 4, 9. Blue Lake asserts that the arbitration provisions containing the waiver language are limited, in part, to a warranty for which Ms. Carls produced no evidence in the trial court. *Id.* at 9. Blue Lake worries that, absent such evidence, it is unknown whether the warranty is still in effect, whether it was assignable, and whether it covers Ms. Carls's claims. Blue Lake's objections are off the mark.

The merits of Ms. Carls's warranty claim against Blue Lake as successor-in-interest to J&L Properties are not before this Court. Nor are the various issues of proof concerning the viability, nature, and scope of the warranty. All these questions are premature, because the antecedent question of whether Blue Lake may be sued in a California state court first must be resolved. Only *after* that jurisdictional issue has been settled can

the merits of Ms. Carls's claims—and of Blue Lake's affirmative defenses—be adjudicated.

Finally, Blue Lake claims the petition should be denied, because Ms. Carls "[was] not even seeking enforcement of the arbitration provisions upon which the waiver claim is based." *Id.* at 9. But the waiver-of-immunity provisions in the home-purchase contract go beyond arbitration and clearly contemplate "lawsuit[s] . . . in state or federal courts." App. at I23, 24, 26-27. Section 23 of the contract, for example, accepts state- or federal-court jurisdiction without specific reference to the enforcement of arbitration provisions:

> In the event legal action is brought to enforce or interpret ***any provision*** of this Agreement to the escrow instructions executed pursuant hereto, the prevailing party shall be entitled to costs and reasonable attorney's fees and shall be fixed ***by the court***.

App. at I16 (emphasis added).

Even if Blue Lake's characterization of the contract were correct, waiver of immunity from arbitration logically constitutes waiver of immunity from state- and federal-court adjudication. As the Alaska Supreme Court observed:

> There is little substantive difference between an agreement that any dispute arising from a contract shall be resolved by the federal courts and an agreement that any dispute shall be resolved by arbitration; both appear to be clear indications that sovereign immunity has been waived. Accordingly, we hold that [the tribal entity] waived whatever immunity from suit it possessed by entering

> into a contract with GC Contractors containing an agreement that any disputes arising under the contract would be resolved by arbitration.

Native Village of Eyak v. GC Contractors, 658 P.2d 756, 760-61 (Alaska 1983), cited approvingly in *C&L Enterprises*, 532 U.S. at 417.

III

THE FEDERAL QUESTION CONCERNING EXPANSION OF TRIBAL IMMUNITY HAS NATIONWIDE IMPLICATIONS

As described in the petition, expansion of tribal immunity in the commercial context presents a question of nationwide importance for the Court's consideration. Pet. at 15-19. Blue Lake does not contest this fact. It does not deny the far-reaching negative consequences of such expansion, particularly for unwitting non-tribe consumers. *Id.* at 15-17. Nor does it deny that expansion of tribal immunity advances none of the policies favoring Native Americans. *Id.* at 17-19.

Instead, Blue Lake claims the issue has no nationwide importance, because the court of appeal's decision "is unpublished and . . . not applicable to other individuals or transactions." Opp. at 9. The argument is a non-sequitur. The petition rests upon the far-reaching implications of *a federal question*—not of a particular court opinion. Put differently, the binding effect of an appellate-court opinion has no bearing on the importance of the federal question the court decides. If it did, no federal question decided by an appellate court could *ever* be important enough for this

Court's review, since even a published decision is binding only within the appellate court's very limited jurisdiction.

That the court of appeal's decision is unpublished is immaterial. The decision raised a federal question that transcends the specific facts and parties of this case, implicating the commercial transactions of tribal and non-tribal entities across the country. It is a question whose nationwide significance merits this Court's review.

CONCLUSION

For these reasons, the petition should be granted.

DATED: April, 2008.

Respectfully submitted,

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